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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

KURT GOESCH, et. al., Plaintiffs and Respondents, v. DONALD D. HENNAGAN, JR., Defendant and Appellant.	H037259 (San Benito County Super. Ct. No. CU-08-00120)

After a court trial in this quiet title action, judgment was entered in favor of defendants Donald Hennagan, Jr., Donna Marie Beckett, and Barbara Jean Greninger. Upon the motion of plaintiffs Kurt and Holly Goesch, however, the court reconsidered its ruling, vacated the judgment, and entered a new judgment for plaintiffs. Only Donald Hennagan, Jr. appeals, contending that the judgment must be reversed because plaintiffs' claims were barred by the statute of limitations, laches, and res judicata. Appellant further asserts errors in the admission of testimony and in the court's reliance on an agreement between plaintiffs and defendants' deceased parents for the transfer of the subject property to plaintiffs. Finally, appellant contends that costs and attorney fees were improperly awarded. The limited record designated by appellant reveals no error. Accordingly, we must affirm the judgment.

Background

In summarizing the factual and procedural history of this dispute, we acknowledge plaintiffs' observation that appellant has disregarded the rules governing appellate briefs by failing to support his factual assertions with citations to the record. California Rules of Court, rule 8.204(a)(1)(C) requires each brief to "support any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears." A brief that does not comply with this rule may be struck and returned for correction. (Cal. Rules of Court, rule 8.204(e).) Alternatively, "[b]ecause '[t]here is no duty on this court to search the record for evidence' [citation], [we] *may* disregard any factual contention not supported by a proper citation to the record." (*Grant-Burton v. Covenant Care, Inc.* (2002) 99 Cal.App.4th 1361, 1379.) We elect the second option and will therefore disregard appellant's entire statement of facts and statement of procedural history.[1]

The parties have been acquainted since 1993, when plaintiff Kurt Goesch (Goesch) began hunting with appellant on land belonging to appellant's family. Goesch often had dinner and stayed overnight with appellant and his parents, Donald Hennagan, Sr. and Barbara Hennagan (collectively, the Hennagans). Each time he went hunting on the Hennagans' property he paid them $200 and gave appellant money for "hunting services." After a year or so of extended visits Goesch thought of Donald Hennagan, Sr. as a father and called him "Pops."

In mid-1994 Donald Hennagan, Sr. told Goesch that there was some land for sale which was unavailable unless the buyer had land touching it. Goesch learned later that this was "really not the truth"; in fact, he explained, a person with land touching the

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[1] Plaintiffs are not innocent of this same failing. They, too, describe procedural details, such as the contents of their motion for attorney fees and costs, that are not reflected in the appellate record.

parcel had "first crack at it" when it went up for sale, but it would be available to the public if no one bought it.

Donald Hennagan, Sr. told Goesch that there was an 80-acre parcel and a 240-acre parcel. The 80 acres, he explained to Goesch, "was pretty important because that kind of gave them access to the 240, and we really needed the 80 acres so we wouldn't be cut off." Donald Hennagan, Sr. added that he would rather see Goesch buy the property than someone else because the Hennagans had a lot of problems with their neighbors.

After hearing that, Goesch agreed to buy both parcels, but he needed to go through his attorney. Plaintiffs' attorney drafted an agreement, which was signed by both plaintiffs, Barbara Hennagan, and Donald Hennagan, Sr. at a meeting in mid-August 1994. The agreement provided that the Hennagans would submit a bid on the 240 acres with money supplied by plaintiffs. After completing the purchase the Hennagans would transfer the property to plaintiffs by deed, along with a permanent easement over the Hennagans' property for the purpose of hunting. Plaintiffs in turn were to grant the Hennagans a permanent easement over the purchased land for the purpose of grazing livestock. Also included in the agreement was a $1,200 interest-free loan to the Hennagans, payable October 31, 1994.

During the meeting plaintiffs gave the Hennagans two checks made out to the San Benito Title Company, dated August 15, 1994: one for $6,499.20, the down payment for the 240 acres; and one for the $1,200 loan. Goesch's intent was to pay the balance of the sale price through an equity line of credit on his home. He obtained that line of credit for $50,000 on November 23, 1994. Sometime thereafter the parties met again so that Goesch could complete payment for both parcels. Goesch gave the Hennagans two checks dated April 29, 1995, for $13,507.65 (the final payment for the 240-acre parcel) and $5,939.41 (for the 80-acre parcel), made out to the San Benito Title Company.

A couple of weeks later Donald Hennagan, Sr. called Goesch to tell him that they had "got both parcels, but there was a problem on the 80 acres." Barbara Hennagan later

explained in a letter that the 80-acre parcel was encumbered by a lifetime lease, and she returned plaintiffs' money for that purchase. Later, however, plaintiffs learned that Barbara Hennagan had actually transferred the property to one of appellant's sisters, defendant Donna Burkett.

Barbara Hennagan received a grant deed for the 240 acres on September 28, 1995. Donald Hennagan, Sr. suggested that the parties wait a year before transferring title, and Goesch agreed. Nevertheless, Goesch began hunting on the property, which he considered his own. The Hennagans gave him a key to their gate, and he made extra keys for them. He no longer paid for access, but he continued paying appellant for his "guide service." His friends also hunted on the property; when he was not with them, they paid the Hennagans an access fee. Donald Hennagan, Sr. told some of Goesch's friends that the land belonged to Goesch. The Hennagans did not repay the $1,200 loan; instead, Donald Hennagan, Sr. suggested that he "cover the taxes at the beginning, they are not that much."

After the Hennagans received the grant deed, which was taken in Barbara Hennagan's name, both Goesch and appellant had conversations with Donald Hennagan, Sr. "many many many times" about transferring the title to Goesch. Barbara Hennagan died in June 1997. Donald Hennagan, Sr. thereafter continued to assure Goesch that transferring the title was "not a problem," but he would fail to show up at an appointed time or had an excuse not to appear for the transfer. Goesch did not worry about the amount of time it was taking, because he was enjoying the use of the property; but at his wife's request he had his attorney draw up some more paperwork. Donald Hennagan, Sr. signed some of the documents, but he refused to sign the grant deed, saying he "just . . . can't sign it right now." Finally, after hunting with appellant in 2008, Goesch asked Donald Hennagan, Sr. again about signing the grant deed. This time, according to Goesch, "he flat out told me, 'I'm not going to sign the grant deed. The girls will not let me sign the grant deed.' "

Plaintiffs initiated this action on September 22, 2008. The following February they amended their complaint to name appellant and his sisters, Barbara Jean Greninger and Donna Marie Burkett, as defendants. In September 2009 and October 2010 defendants moved to dismiss the complaint; but on both occasions the court denied the motion. Donald Hennagan, Sr. died in December 2010, before the April 2011 trial. The court ordered that appellant, Greninger, and Burkett be deemed successors in interest to the Hennagans.

Plaintiffs' complaint is not in the record designated by appellant. The reporter's transcript of the trial indicates that they were seeking quiet title to the property as of September 28, 1995, the date Barbara Hennagan received the grant deed. Plaintiffs also requested a constructive trust on the property.

At trial appellant recalled the deal between his father and plaintiffs somewhat differently than plaintiffs. He said that "it was like not really buying [the property] for [Kurt Goesch], it was to make the total . . . Hennagan Ranch bigger." He explained that he viewed Goesch "like a brother," and the purchase of the land was to keep the property in the family. He did not think that transferring the property to Goesch would be "a big deal," because even though it would be changing hands it would still be "family property."

Appellant confirmed that his father had promised Goesch "on many occasions" to transfer the property to Goesch but refused to do so. Appellant himself had asked his father to transfer the property to Goesch; his father, however, did not want Goesch to know that he had no intent of making the transfer. Appellant did not believe that plaintiffs were trying to steal the property, and he acknowledged that Goesch had provided the money for the purchase. When asked if Goesch, having paid for the property, was entitled to it, appellant answered, "Well, yes, I guess."

After testifying on direct examination by plaintiffs, appellant was cross-examined by his sister, Barbara Jean Greninger. Appellant agreed with Greninger's suggestion that

it was defendants who had maintained the property and, until 2008 or 2009, paid the taxes on it, because they, not plaintiffs, were in possession of the property "the whole time." Appellant also agreed with Greninger that Donald Hennagan, Sr. was unable to read or write; yet he was stubborn, and "if he would have [*sic*] wanted to sign the papers, he would have."

In their argument to the court defendants urged that plaintiffs had no "legal basis to file their complaint," because they had not paid the taxes on the property and the statute of limitations on fraud had expired one year after Barbara Hennagan died. Along the same lines defendants asserted a defense of laches. Plaintiffs emphasized, however, that paying the taxes, which both parties claimed to have done, was irrelevant because this case was not about adverse possession.

On April 5, 2011, the court issued a statement of decision in which it found that "the Goesch[es] kept their part of the deal" but "the Hennagan[s] did not intend to keep their part of the deal." Addressing the remedy, however, the court stated that "[t]o impose a constructive trust on real property, there must be an underlying cause of action. That cause of action here is fraud. The statute of limitations for fraud is three years, and begins to run from the date the plaintiffs discovered or reasonably could have discovered the fraud. And that's the rub here." The court concluded that it was "not reasonable to wait 13 years to . . . assert one's legal rights." Consequently, the statute of limitations precluded plaintiffs' recovery.

Plaintiffs moved to vacate the judgment. The motion is not in the appellate record, although defendants' opposition is, along with their own motion for a new trial. At a hearing on the posttrial motions, the court discussed the alternative remedy of a resulting trust, which it understood to "come[] from simply the law carrying out the intention of the parties" rather than from a defendant's acquisition of title by fraud. Applying Code of Civil Procedure section 663, the court announced that upon reconsideration of its legal reasoning, a resulting trust rather than a constructive trust was appropriate in this case.

Donald Hennagan, Sr. had made assurances that he would transfer the title to Goesch, and because of their close relationship, Goesch "didn't push the issue." When Donald Hennagan, Sr. finally refused "in no uncertain terms" to sign over the deed, Goesch filed the lawsuit, "clearly within the statute of limitations."

Thus, plaintiffs having carried their burden of proof by clear and convincing evidence, the court concluded that its previous analysis was erroneous and unsupported by its factual findings. Accordingly, on July 7, 2011, it ordered entry of a new judgment declaring plaintiffs to be "the concurrent owners in fee simple as joint tenants of the real property" and the holders of a permanent easement over the property of defendants. Defendants were adjudged to have a permanent easement over the property of plaintiffs "for the purpose of grazing livestock."

In the final judgment the court also stated that plaintiffs "shall recover" costs and attorney fees, but it left the amount blank. Plaintiffs' ensuing motion for those costs and fees is, again, not in the record designated by defendants. Defendants have provided their opposition, however, in which they argued primarily that (1) they personally had taken no part in the Hennagan-Goesch agreement; (2) this action was for quiet title, not breach of contract, so Civil Code section 1717 was unavailable to plaintiffs; and (3) attorney fees were not justified under Code of Civil Procedure section 128.5.

On August 3, 2011, the court filed its order granting plaintiffs their costs and attorney fees. Plaintiffs were awarded $5,847.01 in costs and $50,000 in attorney fees. Appellant's notice of appeal, which he filed on August 15, 2011, indicated that it was from the judgment after the court trial.

Discussion

Several of appellant's arguments are tangential and immaterial to the issues raised by the parties below, and many are based on nothing in the appellate record. Appellant argues, for example, that the "trial court failed to properly review the case file and did not review the trial transcript at all" before granting plaintiffs' motion to vacate the judgment.

Appellant ignores the fact that the trial judge, having presided over the trial, was familiar with the case, which had ended less than two months earlier. Contrary to appellant's supposition, the judge stated that she had reviewed both parties' "motions and supporting materials as well as the defendant[s'] response." She specifically stated that she had "had the opportunity to review the file," including her notes from the trial and the exhibits that were admitted into evidence. Only the reporter's transcript was omitted from her review. Appellant makes no showing that this transcript was necessary to supplement the judge's memory and the documents in the case file, nor does he suggest how the judge's decision would have been different.

Also of no consequence is appellant's discussion of a proposed second amended complaint, which was rejected by the court, and of defendants' unsuccessful motion to dismiss in 2009. Neither of these pleadings is in the appellate record, and appellant fails to show how they relate to any error in the final judgment.

Appellant further maintains that plaintiffs were never in possession of the property and were therefore barred from suing for quiet title by the five-year statute of limitations in Code of Civil Procedure section 318. The court, however, agreed with defendants that possession had not been proved. Nevertheless, possession of the property is not among the elements plaintiffs had to prove to obtain a judgment of quiet title.[2] Similarly, the question of who paid taxes is irrelevant, as this is not an adverse possession case.

Appellant repeatedly asserts facts that are either irrelevant or contrary to the court's findings. He claims, for example, that the close personal relationship between Goesch and the Hennagans is "a total fabracation [*sic*]." He fails to explain the significance of this statement, even if it were supported by the record. He faults the trial

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[2] Code of Civil Procedure section 761.020 sets forth the requirements of a complaint for quiet title: a description of the property; the title plaintiff seeks; the nature of the other party's adverse claim; the date as of which title is sought; and a prayer for the relief sought.

court for accepting allegations "based on lies," inserts his account of events that were never presented at trial, and portrays Goesch as a "predatory animal" who took advantage of a destitute family whose father was ill and incompetent. In his reply brief appellant even takes the opportunity to cast aspersions on the character and integrity of the trial judge. None of these indefensible tactics advances his case for reversal of the judgment.[3]

1. Timeliness Issues

Turning his attention to the court's April 5, 2011 statement of decision, appellant insists that the statute of limitations for fraud had expired. He further argues that defendants could not have acted fraudulently because they took no part in their parents' conduct and did not even learn of the "problem" until 13 years "after the fact." Moreover, their father could not have engaged in fraud because he "could not read or write, was not of sound mind and had limited mental competency, [and] it was clear that he was unable to make decisions because of an inability to understand." In appellant's view, only Barbara Hennagan could have "perpetrated the aledged [*sic*] fraud." But her mere failure to perform a promise was not fraud, appellant points out, as she made no misrepresentations and had no intent to defraud plaintiffs.

Even if these factual assertions were consistent with the trial court's factual findings and supported by the record, we would find no basis for reversal based on lack of fraud. A finding of fraud was unnecessary for the imposition of a resulting trust, which was the remedy the court adopted in its final judgment.[4] Thus, whether the

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[3] Indeed, appellant's gratuitous disparagement of the trial judge, opposing counsel, and plaintiffs, along with his assertion of facts in complete derogation of the appellate rules, gave this court considerable pause in deciding whether to grant the motion of plaintiffs for sanctions under California Rules of Court, rule 8.276 and Code of Civil Procedure section 907.

[4] " 'A resulting trust arises from a transfer of property under circumstances showing that the transferee was not intended to take the beneficial interest. [Citations.] It has been termed an "intention-enforcing" trust, to distinguish it from the other type of implied

conduct of the Hennagans can be characterized as fraud or, as appellant urges, should instead be described as breach of contract, is immaterial. The court's initial conclusion that the statute of limitations for fraud had expired has no bearing on our appellate review, because the court later rejected that theory of recovery entirely, in the course of reconsidering its statement of decision.

The statute of limitations for a resulting trust is four years. (Code Civ. Proc., § 343.) That period did not begin to run when the purchase was made in 1995, as appellant assumes. "The statute of limitations does not run on a beneficiary of a resulting trust until he has actual knowledge of repudiation or breach of trust. . . . Where, as here, there is no claim of wrongdoing in the original placing of the title in defendant's name, the cause of action for a constructive [or resulting] trust does not arise until the transferee repudiates the oral promise or in some other way indicates she is holding the property adversely to the plaintiff in violation of her duty." (*Martin v. Kehl* (1983) 145 Cal.App.3d 228, 240.) " 'A resulting trust is not founded on the simple fact that money or property of one has been used by another to purchase property. It is founded on a relationship between the two, on the fact that as between them, consciously and intentionally, one has advanced the consideration wherewith to make a purchase in the name of the other. The trust arises because it is the natural presumption in such a case that it was their intention that the ostensible purchaser should acquire and hold the property for the one with whose means it was acquired.' *In the absence of a repudiation by the trustee, the statute of limitations does not begin to run against a voluntary resulting trust.*" (*Berniker v. Berniker* (1947) 30 Cal.2d 439, 447-448, italics added; see also *In re Estate of Yool* (2007) 151 Cal.App.4th 867, 875 ["The statute of limitations

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trust, the constructive or "fraud-rectifying" trust. The resulting trust carries out the inferred intent of the parties; the constructive trust defeats or prevents the wrongful act of one of them.' [Citations.]" (*American Motorists Ins. Co. v. Cowan* (1982) 127 Cal.App.3d 875, 884-885; *Martin v. Kehl* (1983) 145 Cal.App.3d 228, 238.)

does not begin to run against a voluntary resulting trust in the absence of repudiation by the trustee, that is, until demand has been made upon the trustee and the trustee refuses to account or convey"].)

Here, the trial court found that the required repudiation did not occur until 2008, when Donald Hennagan, Sr. unequivocally refused to transfer title to Goesch. Plaintiffs filed their complaint in September of the same year. Appellant does not demonstrate error based on a lack of substantial evidence to support the court's determination of the timing of the repudiation, or any other ground for holding that plaintiffs' recovery was barred by the four-year statute of limitations.[5] (See *Novak v. Novak* (1967) 249 Cal.App.2d 438, 442, [where court has determined existence of trust by "clear, satisfactory and convincing" evidence, appellate court may not reweigh conflicts in the evidence that were properly resolved by the trial court].)

Appellant also relies on the passage of time in renewing his claim that the doctrine of laches precluded plaintiffs' claim. This argument fares no better. " '[T]he affirmative defense of laches requires unreasonable delay in bringing suit "plus either acquiescence in the act about which plaintiff complains or prejudice to the defendant resulting from the delay." ' " (*Martin v. Kehl, supra,* 145 Cal.App.3d at p. 241.) Laches "is of little significance in the case of a resulting trust [citation]; and 'it is not designed to punish a plaintiff' but is 'invoked where a refusal would be to permit an unwarranted injustice.' [Citation.]" (*Berniker v. Berniker, supra,* 30 Cal.2d 439, 449; see also *Moultrie v. Wright* (1908) 154 Cal. 520, 526 ["What might be deemed laches in case of a constructive trust, might be of no significance if it were a resulting trust"].) Accordingly, "[t]he beneficiary of a resulting trust will not be barred from enforcing it merely because

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[5] Obviously the result would be the same if the statute of limitations were three years under either of the provisions cited by appellant, Code of Civil Procedure section 318 and 338.

of the lapse of time if the trustee has not repudiated the trust to his knowledge. [Citation.] . . . Moreover, prejudice is never presumed; rather it must be affirmatively demonstrated by the defendant in order to sustain [his or] her burden of proof and the production of evidence on the issue." (*Martin v. Kehl*, *supra*, 145 Cal.App.3d at p. 241; see also *Butler v. Holman* (1956) 146 Cal.App.2d 22, 29 [no prejudice absent defendant's injury from the delay].)

Here, it is clear from the trial court's findings, supported by substantial evidence presented at trial, that plaintiffs had no reason to believe that the Hennagans were holding the property adversely because the Hennagans had not "repudiated the trust to [their] knowledge." (*Martin v. Kehl*, *supra*, 145 Cal.App.3d at p. 241.) We further see no showing of prejudice to defendants from the delay in bringing suit to enforce the Hennagans' promise to transfer title to plaintiffs. (*Ibid.*; *Berniker v. Berniker, supra*, 30 Cal.2d at p. 448 .)[6]

2. Res Judicata

Appellant further contends that the trial court improperly revisited the conclusions it reached in its April 5, 2011 statement of decision. That decision, he believes, was res judicata. After noting both the claim-preclusion and issue-preclusion (collateral estoppel) aspects of res judicata, appellant does not explain why he believes that either aspect of the doctrine applies here. Neither does.

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[6] Even if the remedy imposed had been a constructive trust, rather than a resulting trust, the defense of laches would not have foreclosed plaintiffs' action as a matter of law. "[T]he beneficiary of a constructive trust will not be barred by laches even though he knows of the circumstances giving rise to the trust where he has no reason to believe that the constructive trustee is holding the property adversely." (*Martin v. Kehl, supra,* 145 Cal.App.3d 228, 241; see also *Marshall v. Marshall* (1965) 232 Cal.App.2d 232, 252 ["doctrine of laches does not begin to operate until the [constructive] trustee begins to act in hostility to such continuing obligation and such repudiation of the trust has been brought home to the beneficiary"].)

"Res judicata, or claim preclusion, prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them." (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896.) It is readily apparent that this aspect has no application to this case; there has been only one lawsuit.

We assume that appellant is relying instead on collateral estoppel, or claim preclusion, which "precludes relitigation of issues argued and decided in prior proceedings." (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341.) Collateral estoppel can be established in certain procedural circumstances: "First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding." (*Ibid.*; *Johnson v. GlaxoSmithKline, Inc.* (2008) 166 Cal.App.4th 1497, 1508.)

Plainly, collateral estoppel is inapplicable here. There is no "former proceeding," nor was the trial court's initial decision "final and on the merits." Appellant's assertion of res judicata in either of its applications necessarily fails.

3. Evidentiary Error

Appellant next invokes the "so called Dead Man's Statutes," which he contends precluded testimony regarding any conversations or transactions with a decedent—namely, either of the Hennagans. No legal argument or citation of authority accompanies this assertion; and indeed, it is completely without merit. There is no extant "dead man's statute" in California. (See former Code Civ. Proc., § 1880.) There is likewise no legal basis offered for appellant's contention that the Hennagans' interests were not represented after their deaths. No authority is cited for the additional suggestion that the trial court "should have opened a probate for Donald Hennagan, Sr.," nor is there any support for

appellant's assertion that the trial could not proceed because the court "failed to subitute [*sic*] a reprehensive [*sic*] into the action." Defendants, intestate heirs who were deemed successors in interest to the Hennagans without objection, were properly added as defendants, in accordance with Code of Civil Procedure section 762.030. No other evidentiary basis for excluding statements by the Hennagans is offered in support of appellant's position.

4. Illegality of the Contract

Finally, appellant contends that the agreement between Goesch and the Hennagans was illegal because (1) it was not recorded and (2) it was "conceived and used as a means to get around the law that only a person with adjoining property could buy the land being sold by the [Bureau of Land Management]." Only the first of these reasons was offered to the trial court; and indeed, the court made no finding that the contract was illegal in any respect. Moreover, defendants presented no evidence or authority that the law in fact prohibited the sale to plaintiffs. Goesch's understanding, based on what Donald Hennagan, Sr. misleadingly told him, was that only an adjoining landowner could buy the property. He later learned that this representation was not true; the property would be offered to the public if no adjoining landowners bought it. Thus, appellant's assertion that the agreement was an illegal means to evade a law is without foundation. Finally, plaintiffs' observation that any illegality did not prevent the application of equity by imposing a resulting trust is well taken. It is clear that the trial court found a resulting trust appropriate to prevent unjust enrichment of defendants. (Cf. *Johnson v. Johnson* (1987) 192 Cal.App.3d 551, 557 [illegality of loan did not necessarily preclude enforcement through resulting trust].) "The rule that the courts will not lend their aid to the enforcement of an illegal agreement or one against public policy is fundamentally sound. The rule was conceived for the purposes of protecting the public and the courts from imposition. It is a rule predicated upon sound public policy. But the courts should not be so enamored with the Latin phrase '*in pari delicto*' that they blindly extend the rule

to every case where illegality appears somewhere in the transaction. The fundamental purpose of the rule must always be kept in mind, and the realities of the situation must be considered. Where, by applying the rule, the public cannot be protected because the transaction has been completed, where no serious moral turpitude is involved, where the defendant is the one guilty of the greatest moral fault, and where to apply the rule will be to permit the defendant to be unjustly enriched at the expense of the plaintiff, the rule should not be applied." (*Norwood v. Judd* (1949) 93 Cal.App.2d 276, 288-289.)

As plaintiffs point out, there was no issue of protecting the public or serious moral turpitude presented here, and if there was "moral fault," it inhered in the Hennagans' conduct. Illegality of the Goesch-Hennagan agreement cannot serve as a basis for reversal.

5. Attorney Fees

Appellant next takes issue with the court's imposition of costs and attorney fees. He and his sisters, he argues, "took no part in the agreement to purchase the land," were without power "to execute any requirements" of the agreement, and were only "third parties to this legal action." Addressing the merits of the fee claim, appellant briefly asserts that plaintiffs were not entitled to fees under Civil Code section 1717 because this is a quiet title action, not an action on a contract. In his reply brief he also attempts to refute plaintiffs' proffered justification under Code of Civil Procedure section 128.5, by urging that plaintiffs, not defendants, were the ones who "caused unnecessary delay and used 'frivolous' tactics." Appellant does not offer any argument specifically directed at the award of costs. (Code Civ. Proc., § 1032.)

Plaintiffs initially respond that this court lacks jurisdiction to consider this issue because appellant did not file a notice of appeal from the postjudgment order awarding costs and fees. They alternatively argue that fees were justified in any event under both Civil Code section 1717 and Code of Civil Procedure section 128.5. We agree with the first point, which is dispositive.

In *Grant v. List & Lathrop* (1992) 2 Cal.App.4th 993, 996, the court awarded costs, including contractual attorney fees, to the prevailing defendants, but it left the amounts blank for later insertion. In a subsequent proceeding the court ordered specific amounts of costs awarded. The plaintiff appealed from the judgment, but not the later order awarding costs. The reviewing court held that "when a judgment awards costs and fees to a prevailing party and provides for the later determination of the amounts, the notice of appeal subsumes any later order setting the amounts of the award." (*Id*. at p. 998.) Consequently, there was appellate jurisdiction over the fee order.

If, on the other hand, a court leaves not only the amount of fees but the *entitlement* to them for a later proceeding, the losing party must appeal from the later fee order in order for the reviewing court to have jurisdiction over the matter. (*Colony Hill v. Ghamaty* (2006) 143 Cal.App.4th 1156, 1172; *DeZerega v. Meggs* (2000) 83 Cal.App.4th 28, 44.) In *Silver v. Pacific American Fish Co., Inc.* (2010) 190 Cal.App.4th 688, the appellate court examined the record beyond the judgment before deciding whether the trial judge had determined entitlement to fees. As in *Grant*, the judgment in *Silver* stated that the cross-defendant, the prevailing party, " 'shall recover . . . attorney fees and costs of suit,' but left a blank space for the amount." (*Id*. at p. 692.) It was the court's statement of decision that resolved the latent ambiguity: it provided that the cross-defendant " 'may make an application for attorney's fees and costs by postjudgment motion for allowance of attorney's fees as an element of costs.' " (*Ibid*.) That language indicated to the reviewing court that "the trial court intended, and the parties understood, that the issue of attorney fees would be the subject of a separate, postjudgment application"—that is, the issue of whether the cross-defendant was entitled to a fee award was "deferred until after judgment." (*Id*. at pp. 692, 693.) The parties thereafter debated which of them was the prevailing party under Code of Civil Procedure section 1032 and Civil Code section 1717. The ensuing minute order "reflects that the trial court adjudicated *both* [the cross-defendant's] entitlement to an award of attorney fees and the

reasonableness of the amounts claimed." (*Id*. at p. 693; see also *Norman I. Krug Real Estate Investments, Inc. v. Praszker* (1990) 220 Cal.App.3d 35, 45 [no jurisdiction to review postjudgment attorney fee order where issue was "deferred" until after judgment.)

In this case the judgment, drafted by plaintiffs' attorney, resembles those of *Grant* and *Silver* by stating that plaintiffs "shall recover against defendants attorneys fees in the amount of $_____." The reporter's transcript of the preceding hearing, however, makes it clear that determination of the fee issue was, as in *Silver* and *Praszker*, deferred. Plaintiffs' counsel even asked the court to continue the matter to give her an opportunity to prepare a billing history and file a brief citing statutory authority, followed by an opportunity for defendants to file opposition and a further hearing by the court. After some initial reluctance, the court granted plaintiffs' request and directed them to accompany their fee request "with appropriate documentation."

It is thus apparent to us that here, as in *Silver*, "the trial court intended, and the parties understood, that the issue of attorney fees would be the subject of a separate, postjudgment application" and hearing. (190 Cal.App.4th at p. 692.) Once again, the record appellant designated contains only defendants' opposition, not the motion itself. The Register of Actions and the court's fee order indicate that a hearing on the motion took place on July 14, 2011. The August 3, 2011 order awarding $50,000 in attorney fees was not the subject of appellant's August 15 notice of appeal, which expressly pertained to the judgment the month before. Appellant having failed to appeal separately from the attorney fee order, the issue of plaintiffs' entitlement to the awarded fees has not been preserved for review.

Even if we were to find we had jurisdiction over the order, we would still be unable to grant the relief appellant seeks. By omitting the motion for attorney fees or a transcript of the motion hearing from the designated record, appellant has precluded any meaningful review of the legal and factual basis for plaintiffs' request. "It is the burden of appellant to provide an accurate record on appeal to demonstrate error. Failure to do so

precludes an adequate review and results in affirmance of the trial court's determination." (*Estrada v. Ramirez* (1999) 71 Cal.App.4th 618, 620, fn. 1; *Mountain Lion Coalition v. Fish & Game Com.* 214 Cal.App.3d 1043, 1051, fn. 9 ["if the record is inadequate for meaningful review, the appellant defaults and the decision of the trial court should be affirmed"].)

Disposition

The judgment is affirmed. Plaintiffs are entitled to their costs on appeal. Their motion for sanctions for a frivolous appeal, however, is denied. (Cal. Rules of Court, rule 8.276; Code of Civ. Proc. § 907.)

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ELIA, J.

WE CONCUR:

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RUSHING, P .J.

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GROVER, J. *

* Judge of the Monterey County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.